good," &c., does not seem to the writer to be supported by the weight of authority; but, inasmuch as a discussion of the question at this time would consume too much space, the subject is dismissed with a simple reference to the note to *Fetrow* v. *Wiseman*, Ewell's Lead. Cases 30–34, where the authorities will be found collected and discussed.

MARSHALL D. EWELL.

Circuit Court of the United States, District of Rhode Island.

TURNER v. MERIDAN FIRE INS. CO.

An insurance policy, containing a provision that it shall be void in case the insured shall make other insurance without the consent,of the company, is avoided by a subsequent insurance without consent, even though the second policy is itself avoided by a similar provision.

T. insured his property, the policy containing a provision that it should be void in case the insured should make other insurance without the written consent of the company; subsequently T. insured in another company, taking a policy with a similar provision. Neither company had notice of the insurance by the other. The property was destroyed by fire. The company which issued the second policy denied all liability, but paid $200 in settlement. Suit was then brought on the first policy. *Held*, that plaintiff could not recover.

THIS was a motion for a new trial. The facts were as follows.

On July 9th 1879, the defendant issued a policy of insurance to the plaintiff, running for five years. Afterwards, on November 15th 1880, the plaintiff took out another policy for five years, covering the same property, in the Springfield Fire and Marine Insurance Company. The property was destroyed by fire March 8th 1881.

Both policies contained a provision that they should be void in case the insured "shall have or shall hereafter make any other insurance on the property" without the written consent of the company. No notice was given of other insurance to either company, nor was the fact discovered until after the fire.

The Springfield company, on learning that the plaintiff had another policy in the defendant company, declined to pay the loss. Afterwards, in October 1881, the Springfield policy was surrendered and cancelled on payment of $200 to the plaintiff. The company, however, always denied any legal liability.

The defendant also refused payment of its policy, on the ground of subsequent insurance in the Springfield company, and false

swearing in relation thereto in the proofs of loss. This suit was brought in February 1882, in the Rhode Island State Court, and afterwards, removed to the United States Circuit Court. The case was heard by the court, jury trial having been waived. And the court being of opinion that the first policy was not avoided gave judgment for plaintiff. Defendant moved for a new trial and the motion was heard before LOWELL and COLT, JJ.

Stephen Essex, for plaintiff.

Oscar Lapham, for defendant.

The opinion of the court was delivered by

COLT, J.—The main question to be determined upon this motion, is whether the defendant company can hold its policy to be invalid, by reason of the subsequent policy taken out in the Springfield company.

What constitutes other insurance, within the meaning of this condition in insurance policies, is a question upon which courts have widely differed.

The doctrine laid down by the highest tribunals of Massachusetts and some other states, is that the subsequent insurance being invalid, at the time of loss, by reason of the breach of condition therein, the prior insurance is good, even though the second company waive the forfeiture, and pay its policy in full. *Thomas* v. *Builders' Ins. Co.*, 119 Mass. 121; *Jackson* v. *Massachusetts Fire Ins. Co.*, 23 Pick. 418; *Clark* v. *New England Fire Ins. Co.*, 6 Cush. 342; *Hardy* v. *Union Ins. Co.*, 4 Allen 217; *Lindley* v. *Union Ins. Co.*, 65 Me. 368; *Philbrook* v. *New England Fire Ins. Co.*, 37 Id. 137; *Gee* v. *Cheshire County Ins. Co.*, 55 N. H. 65; *Gale* v. *Ins. Co.*, 41 Id. 170; *Schenck* v. *Mercer County Ins. Co.*, 4 Zabr. 447; *Jersey City Ins. Co.* v. *Nichol*, Am. L. Reg. Sept. 1882, p. 620 (35 N. J. Eq.) 291; *Stacey* v. *Franklin Ins. Co.*, 2 W. & S. 506; *Sutherland* v. *Old Dominion Ins. Co.*, 8 Ins. L. J. 181 (Va. Ct. of Appeals); *Insurance Co.* v. *Holt*, 35 Ohio St. 189; *Knight* v. *Eureka Ins. Co.*, 26 Id. 664; *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520; *Allison* v. *Phœnix Ins. Co.*, 3 Dil. 480.

On the contrary it is held, elsewhere, that a subsequent policy, whether legally enforceable or not, or whether voidable on its face, or voidable for extrinsic matter, works a forfeiture of the prior

policy. *Somerfield* v. *Ins. Co.*, 8 Lea 547; *Funke* v. *Minnesota Farmers' Ins. Asso.*, 15 Reporter 114; *Suggs* v. *Liverpool, London and Globe Ins. Co.*, 9 Ins. L. J. 657 (Ky. Ct. of Appeals); *Allen* v. *Merchants' Ins. Co.*, 30 La. An. 1386; *Lackey* v. *Georgia Home Ins. Co.*, 42 Geo. 456; *Bigler* v. *N. Y. Central Ins. Co.*, 22 N. Y. 402; *Landers* v. *Watertown Ins. Co.*, 86 N. Y. 414; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters 495; *Jacobs* v. *Equitable Ins. Co.*, 19 U. C. Q. B. 250; *Ramsey* v. *Ins. Co.*, 11 U. C. Q. B. 516; *Mason* v. *Ins. Co.*, 37 U. C. C. P. 47; *Royal Ins. Co.* v. *McCrea, Maury & Co.*, 8 Lea 531; *Equitable Ins. Co.* v. *McCrea, Maury & Co.*, 8 Lea 541.

There is still another view taken by the Supreme Court of Iowa, in the case of *Hubbard* v. *Hartford Fire Ins. Co.*, 33 Iowa 325, to the effect that the question of recovery under the prior policy turns upon whether the subsequent policy has been in fact avoided. If the subsequent policy is recognised by the company issuing it as a valid policy, any breach of condition being waived, this makes it a valid insurance, and constitutes it a good defence to an action upon the prior policy; but if the subsequent policy has been avoided by the company, there is no other insurance, so as to defeat a recovery on the prior policy.

Although at first this reasoning may strike the mind as a fair compromise between the other conflicting positions taken upon this question, it is subject to such grave objections that it cannot be considered tenable.

If the condition in the first policy was violated, it was done at the time the second contract of insurance was entered into, and the subsequent affirmance or disaffirmance of the second contract, should not affect the validity of the first. The validity of the first contract can hardly turn upon what a stranger to it may do with reference to another contract, even after liability upon the first contract has become absolute by a destruction of the property: *Funke* v. *Minnesota Farmers' Insurance Asso.*, *supra.*

At the trial of the cause, it seemed as if the weight of authority was in favor of holding the prior policy good, upon the ground that the subsequent policy was invalid, and this position had been held by Judge DILLON, in *Allison* v. *Phœnix Ins. Co.*, 3 Dil. 480, not to be in conflict with the real point in judgment in *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters 495, but upon fur-

ther consideration of all the authorities, and the principles which govern them, we cannot adopt this view.

This construction is open to the objection, that the insured may collect both policies. It is also subject to the criticism that in deciding upon the validity of one contract, the court, in the same action, must go outside of it, and determine, first, the validity of one or more independent contracts, involving, perhaps, an inquiry into complicated questions of fact respecting those contracts: *Royal Ins. Co.* v. *McCrea, Maury & Co.*, 8 Lea 531.

But further than this the principle upon which this construction is founded does not appear to be satisfactory. The reasoning in these cases is based largely on the assumption that the second policy is *void* by reason of the breach of condition therein, and that the issuing of such a void policy is no violation of the condition as to other insurance in the first policy. But is not this assumption too broad? Is it legally true that the second policy is a void contract? Conditions of this character in insurance policies are inserted for the benefit of the insurer, and their violation does not render the policy void, but only voidable at the election of the insurer. It is still a binding contract upon the insured. He can take no advantage of this breach of condition, and the insurer could still enforce the contract against him if anything was to be gained by so doing.

"Although the policy by its terms provides that it shall be void on a breach of any of its conditions, its legal effect is simply to render it voidable at the election of the insurer, and that the insurer can waive the forfeiture and continue the policy in force; or to state the proposition more broadly, in all contracts where the stipulations avoiding the same are inserted for the sole benefit of one of the parties, the word void is to be construed as though the contract read voidable. This view seems to be sound in principle, just in practice, and is certainly well sustained by authority:" *Masonic Mut. Benefit Society* v. *Beck*, Sup. Ct. of Indiana, 11 Ins. L. J., Oct. 1882, 755; *Armstrong* v. *Turquand*, 9 Irish C. L. 32; s. c. 3 Life and Acc. R. 350.

The party in default cannot defeat the contract: *Viele* v. *Germania Ins. Co.*, 26 Iowa 70. The policy is merely voidable and may be avoided by the underwriters upon due proof of facts, but until so avoided it must be treated for all practical purposes as a subsisting policy: *Carpenter* v. *Providence Washington Ins. Co.*,

16 Peters 495. See also *Baer* v. *Phœnix Ins. Co.*, 4 Bush 242, and authorities before cited.

The doctrine of waiver as applied to conditions in policies of insurance and which is invoked so frequently, is founded in part at least upon the theory that breach of condition only renders the policy voidable. The same principle prevails as to conditions in leases where the term void is used. The lease becomes void only by the lessor's electing to trust it so, and not by the mere happening of the breach, and modern decisions have quite exploded the old distinction in this respect between leases for years and for life: *Viele* v. *Germania Ins. Co.*, 26 Iowa 70 note; Taylor's Land. & Ten., sect. 492.

As the second policy is not a void contract, but only voidable at the election of the company, as it is a contract entered into by the insured, and which he cannot dispute, and as the reason, if any, why he cannot legally enforce it arises from his own neglect or misrepresentation, may it not be fairly claimed that this is other insurance within the meaning and intent of the condition in the first policy? We think the rule, supported as it is by authorities of great weight, which holds the taking out of a voidable policy a violation of the provision respecting other insurance in the first policy, the best one, and subject to less serious objections than any other.

What was the position of this plaintiff at the time of the loss? He had one policy of insurance in the defendant company, and he had another policy of later date in the Springfield company. This second policy was issued in good faith by the Springfield company and the premium paid. It was a policy the validity of which the plaintiff could not deny, and upon which he obtained $200 by way of compromise. It seems to us that upon any fair rule of interpretation this must be considered a breach of the condition as to other insurance in the defendant's policy.

We cannot bring our minds to assent to the proposition that a subsequent contract of insurance binding upon the assured, and which the company may pay in full or in part, is no violation of the terms of the first policy.

We believe the general rule, that conditions in insurance policies inserted for the benefit of the company should be strictly construed against it, to be a sound one, and we do not think our conclusion in this case inconsistent with this doctrine; at the same time we should

bear in mind that this condition is a reasonable one, in that it is of great consequence to the insurer as a protection against fraud to know whether other insurance exists; and it is said, therefore, that this provision is not regarded with the jealousy due to other provisions which work a forfeiture, but is upheld as a fair and just provision for a reasonable and proper purpose: May on Ins., sect. 346.

New trial granted.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

SUPREME COURT OF MAINE.[3]

COURT OF CHANCERY OF NEW JERSEY.[4]

SUPREME COURT OF WISCONSIN.[5]

ATTORNEY.

Liability to Officer for Fees.—An attorney at law is liable to the officer for his fees for the service of writs delivered by him to such officer, although he is neither the plaintiff nor a party in interest; likewise to the clerk of courts for his fees on writs delivered by him to such clerk for entry. And neither the officer nor the clerk is required to perform the services without a prepayment of their respective fees: *Tilton* v. *Wright*, 74 Me.

CONSTITUTIONAL LAW.

Criminal Law—Conspiracy against Civil Rights—Sect. 5519 *Rev. Stat.*—Sect. 5519 Rev. Stat. making criminal a conspiring or going in disguise "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constitnted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws" was not authorized by sect. 2, of art. 4, of the original constitution or by the 13th, 14th or 15th amendment thereof, and is unconstitutional: *The United States* v. *Harris*, S. C. U. S., Oct. Term 1882.

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 16 Otto.

[2] From Hon. N. L. Freeman, Reporter; to appear in 105 Ill. Reports.

[3] From J. W. Spaulding, Esq., Reporter; to appear in 74 Me. Reports.

[4] From Hon. John H. Stewart, Reporter; to appear in 36 N. J. Equity Rep.

[5] From Hon. O. M. Conover, Reporter; to appear in 56 and 57 Wis. Reports.